



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2005

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County
P. O. Box 61429
Houston, Texas 77208-1429

OR2005-00017

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 215962.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for a psychological report and a professional standards investigation relating to a named individual. You state that the authority has released the report and parts of the investigation. You claim that the rest of the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that section 552.022 of the Government Code is applicable to most of the submitted information. Section 552.022(a) provides in part that

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, you inform us that most of the submitted information consists of completed criminal investigations made of, for, or by other

governmental bodies. The completed investigations must be released under section 552.022(a)(1) unless they contain information that is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. — Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the authority may not withhold any information contained in the completed investigations under section 552.103.

You also seek to withhold all of the submitted information under section 552.108(a)(2) and 552.108(b)(2). Section 552.108(a)(2) excepts from public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). Section 552.108(b)(2) excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" *Id.* § 552.108(b)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Section 552.108(a)(2) and 552.108(b)(2) are applicable only if the information in question relates to a concluded criminal case that did not result in a conviction or a deferred adjudication.

In this instance, the submitted documents reflect that the information at issue relates to an internal affairs investigation conducted by the authority's police department. We note that section 552.108 is generally not applicable to the records of an internal affairs investigation that is purely administrative in nature. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App. — Austin 2002, no pet.), *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App. — El Paso 1992, writ denied) (statutory predecessor to Gov't Code § 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision Nos. 562 at 10 (1990) (predecessor to section 552.108(b) inapplicable to employment information in police officer's file), 361 at 2-3 (1983) (statutory predecessor to section 552.108(b) inapplicable to background information collected on unsuccessful applicant for employment with sheriff's department), 350 at 3-4 (1982). You do not inform us, and the submitted information does not otherwise indicate, that the authority's internal affairs investigation has resulted in any

criminal investigation or prosecution. We therefore conclude that you have not demonstrated that section 552.108 is applicable to the records of the internal affairs investigation in their entirety.

We note, however, that this information includes the completed criminal investigations. The submitted documents reflect that the authority obtained these investigations from the Harris County Sheriff's Department (the "sheriff") and the Harris County Constable – Precinct 5 (the "constable").¹ You inform us that the suspect voluntarily committed himself to a mental health facility in one of these cases. You state that all charges were dropped in the other investigation. You also inform us that the sheriff and the constable concur with the authority in claiming that these criminal investigations are excepted from disclosure under section 552.108 as information relating to cases that concluded in final results other than conviction or deferred adjudication. Based on your representations, we find that section 552.108(a)(2) is applicable to the submitted criminal investigations.

We note, however, that section 552.108 does not except from disclosure "basic information about an arrested person, an arrest, or a crime." Gov't Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App. — Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Basic information must be released under section 552.108(c), including a detailed description of the offense, even if the information does not literally appear on the front page of an offense or arrest report. Because the law enforcement interests involved here are those of the sheriff and the constable, the authority must consult with the sheriff and the constable and release the types of information that are considered to be basic information. *See* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*).

Next, we address your claim under section 552.103 with respect to the remaining information at issue. This exception provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

¹We note that information may be transferred between governmental bodies that are subject to the Act without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See* Attorney General Opinion JM-590 (1986); Open Records Decision No. 661 at 3 (1999). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of efficient and economical administration of their statutory duties. *See* Open Records Decision No. 516 (1989). Thus, a transfer of information between governmental bodies is not a release of the information to the public for the purposes of section 552.007 of the Act, which prohibits the selective disclosure of information, or for those of section 552.352, which provides criminal penalties for the release of information that is considered to be confidential. *Id.*

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. — Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. — Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

In this instance, you do not inform us that any of the remaining information at issue relates to any pending litigation to which the authority was a party when it received this request for information. Likewise, you do not indicate that any of the remaining information relates to any litigation that the authority reasonably anticipated when it received this request. We therefore conclude that you have not demonstrated that any of the remaining information is excepted from disclosure under section 552.103.

In summary: (1) the authority may withhold the completed criminal investigations under section 552.108(a)(2), with the exception of the basic information that must be released under section 552.108(c); and (2) the rest of the submitted information is not excepted from disclosure and must be released to the requestor.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

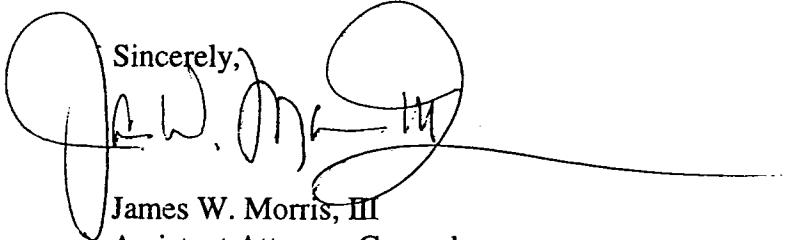
²We note that some of the information that is subject to section 552.108(c) would ordinarily be excepted from public disclosure under section 552.101 in conjunction with common-law privacy. *See* Gov't Code § 552.101; *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The information that must be released also includes a social security number that the authority might be required to withhold from the public. In this instance, however, the requestor has a special right of access to the private information and the social security number as the authorized representative of the individual to whom the information pertains. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the authority receive another request for this same information from a person who would not have a right of access to it, the authority should resubmit this information and request another ruling. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/krl

Ref: ID# 215962

Enc: Submitted documents

c: Mr. Richard Aman
CLEAT Senior Staff Attorney
14405 Walters Road Suite 300
Houston, Texas 77014
(w/o enclosures)